



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

JUDICIAL REVIEW CASE NO. 1 OF 2019

TIMOTHY MUKUNDI GICHOVI.....1ST APPLICANT

ROSEMARY NJURA NYAGA.....2ND APPLICANT

CATHERINE RUGURU NJAGI.....3RD APPLICANT

ESTHER WAMBUI KAMAU.....4TH APPLICANT

ROSE BENARD.....5TH APPLICANT

BONIFACE OTIENO KWEDHU.....6TH APPLICANT

KEN MEME.....7TH APPLICANT

VERSUS

COUNTY GOVERNMENT OF EMBU.....RESPONDENT

JUDGMENT

1. The application before the court is the Notice of Motion dated the 22nd November, 2019 by the applicants whose business entities operate in Embu within the republic of Kenya and which they stated, are fully registered to carry out business in Kenya, their specialization being the supply/sale of alcoholic drinks.

2. The respondent is the County Government of Embu created under the Constitution of Kenya 2010 and also charged with the responsibility of controlling and issuance of liquor licenses within Embu County.

3. The applicants seek the following orders from this court: -

1) That this Honourable Court do issue an order of certiorari to remove to the High Court and quash the decision of the respondent, the County Government of Embu made and conveyed vide memo. RF. CO T&T/ALCOH.8/1 VOL.IV/16 dated 10th July, 2019 directing the applicants to close their liquor business or in any way interfering with the applicants' lawful operations of their business pursuant to the Alcoholic Drinks Control Act No. 4 of 2010 of the Laws of Kenya or otherwise.

2) An order of prohibition directed at the respondent, its officers and any other authority acting on its instructions from conducting raids, closing, vandalising, confiscating, impounding and or seizing or in any other manner whatsoever, the applicants' liquor businesses the same being Stall No. 9 (Bricks Wines and Spirits) and Stall No. 73A (Smith Wines & Spirits), Stall No. 6A (Hustlers Wines & Spirits), Stall No. 27 (Esther Wambui), Stall No. 29 (Sir Wines & Spirits), Stall No. 4 (Bre-K Wines & Spirits), and Stall No. 7 (Kiuthi Wines) or in any way interfering with the applicants' lawful operations of their business pursuant to the Alcoholic Drinks Control Act No. 4 of 2010 of the Laws of Kenya or otherwise.

3) An order of mandamus directed at the respondent, its officers and any other authority acting on its instructions compelling them to issue liquor license to enable the applicant operate within the respondent's regulations.

4) That the Honourable Court do make such other or alternative orders as will meet the interests of justice.

5) That the respondents be condemned to pay cost of this application.

4. The grounds upon which the applicants seek the above reliefs are that:

a) They are fully registered to carry out business in Kenya their specialization being the supply/sale of alcoholic drinks and that they have been issued with licenses by the respondent to operate the aforesaid business within Embu County and that they procured for valuable consideration alcoholic drinks for sale at their business premises which businesses are also licensed for purposes of the sale of alcoholic drinks.

b) That the applicants despite several applications have been denied a chance to renew their liquor licenses without any justification and explanation.

c) That the respondent has issued a notice of closure of liquor businesses effective 7th November, 2019 without any color or right or justification whatsoever, without any reasonable explanation or at all, which is in breach of their fundamental rights to a fair hearing and right to administrative action.

d) That the applicants have been engaging the respondent with a view to having the closure notice lifted in vain but the respondent is adamant and has verbally, through its officers promised to use brute force against the applicants come the 7th day of November, 2019.

e) That the aforesaid decision by the respondent to close the liquor business was made in bad faith, is biased, unreasonable, procedurally flawed, is an abuse of power, is ill intentioned and an infringement of the applicants rights protected under the Constitution 2010. That the notice has been issued to some of the liquor business showing utter bias on the part of the respondent.

f) That the aforesaid action by the respondent in refusing to give the applicants a fair and administrative action and the respondent's failure to accord the applicants a right to be heard is an affront to Article 47(2) and 27 of the Constitution. The closure of business is an infringement of their right to own property and is an affront to Article 40 of the Constitution.

g) That if this honourable court does not intervene, the applicants will continue to suffer injustice at the behest of the respondent to the detriment of their investments as business persons.

h) That the applicants stand to suffer irreparable damage and hefty losses and hence the inability to earn a living if the respondent is allowed to continue closing liquor businesses. That the loss and damage that the applicant shall suffer should the respondent be allowed to proceed with their actions shall be wholly disproportionate to any purported benefit that the respondent would derive from continuing with their arbitrary and unreasonable use of power.

5. The application is supported by the verifying affidavit sworn by Timothy Mukundi Gichovi, sworn on the 22nd day of November 2019 and the annexures thereto.

6. The application was opposed by the respondent by way of a replying affidavit sworn by Johnson N. Nyaga on the 29th September 2020, who at the material time, was the acting County Secretary of the respondent. He averred that whereas it is true that the applicants were granted business permits to operate alcohol and liquor selling business, the said permits come with specific conditions and must be used within the confines of the provisions of the law. He has contended that the persons granted licenses annexed to the verifying affidavit are not the same persons listed in the prayers in the Notice of Motion and that granting the prayers sought will be tantamount to benefitting a person who is not a party to the suit. Further that some of the applicants do not have business permits.

7. He deponed that the Embu Alcoholic Drinks Control Act, 2014 was passed by the members of Embu County Assembly in their capacity as representatives of the people of Embu County and that the applicants have not faulted the provisions or legality of the operation of the said Act and it is not in the public interest that the court quashes a directive whose aim is to enforce a law for the benefit of all the residents of Embu. That if the applicants are of the opinion that the Act is not good law, they should petition the County Assembly for amendment of the same as the function of the court is not to amend or repeal the laws made by legislature or other competent authorities.

8. Further that, the memorandum dated 10th July, 2019 which is sought to be quashed was a general one and did not mention any particular area and is therefore misleading for the applicants to allege that the circular was targeted at them in a discriminatory manner. That the applicants have not shown any evidence that their businesses, if they exist, are within areas prescribed by the law and that the applicants are asking the court to assist them continue breaking the law.

9. The deponent contends that the notices were not issued in bad faith as alleged and that the respondent had no reason to act maliciously and that, there is nothing to show that the applicants were discriminated against or that they were selectively targeted.

10. That the applicants have stated that they are ready to comply with any regulations required by the law, one of which is not to sell or operate alcohol selling business within the bus park. That the court should take judicial notice of the fact that a bus park is a public place where children, drivers of public service vehicles and vulnerable people meet and operate and it's not an ideal place for operation of a liquor selling business.

11. Further that, the applicants were given notices to look for alternative premises on 7th August, 2019 with a grace period of three months and they failed to react to the notices or engage the respondent in any way. That there is no evidence that the applicants have made application for renewal of their licences.

12. The applicants filed a further affidavit on the 22nd February, 2021 sworn by the same deponent in which he deposed that the applicants

run their businesses using the business names as stated in prayer 2 of the Notice of Motion and that they all possess business permits. That, they have been operating their businesses since the time immemorial before the establishment of the bus park and before the impugned Act and it is therefore illegal, unfair and discriminatory of the respondent to target them. That even before the impugned Act was passed, their licenses continued to be renewed and therefore, actions by the respondent are not only suspicious but also malicious. That for the fact that the respondent has continued to renew their licenses, they have a legitimate expectation that their licenses would be renewed.

13. The application was disposed off by way of written submissions which both parties filed and which this court has considered together with all the other material before it.

14. In their submissions, both parties agreed on four (4) issues for determination which are;

- 1) *Whether the County Government of Embu had the right to cancel and/or fail to renew the applicants' licenses without due regard to fair administrative action and fair hearing.*
- 2) *Whether the respondent's decision to close down the applicants businesses amounted to abuse of power.*
- 3) *Whether the applicants are entitled to orders of certiorari, prohibition and mandamus.*
- 4) *Who should bear the costs of the application.*

Whether the County Government of Embu had the right to cancel and/or fail to renew the applicants' licenses without due regard to fair administrative action and fair hearing.

15. On this issue, the applicants' case is that the failure by the county Government to renew liquor licenses was done without any justification and arbitrarily, without affording them a fair hearing. That the notice of closure of the liquor business was issued to the applicants without any reasonable explanation which is inconsistent with Articles 47(2) and 50(1) of the Constitution. Further that the decision by the respondent was procedurally flawed, unreasonable, an abuse of power and discriminative and hence contrary to Article 27 of the Constitution. That the applicants right to own property was infringed contrary to Article 40 of the Constitution.

16. The applicants relied on several authorities including **Judicial Service Commission of Kenya Vs Mbalu Mutara & Another [2015] eKLR, Doctors for Life International Vs Speaker of the National Assembly and others (CCT12/05 [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC).**

17. It was further submitted that the Embu Alcoholic Drinks Control Act 2014 was passed by members of Embu County Assembly in their capacity as representatives of the people of Embu County and that the members of the public were not invited to give their views and thus the same is draconian law meant to oppress the applicants without considering that they were not consulted when the Act was passed. Reliance was made on **Petition No. 336 of 2015, Masai Mara (Supa) Vs Narok County Government and that of R Vs Kenya Revenue Authority Exparte Yaya Towers Limited [2008] eKLR** on the remedy of judicial review and when the same should be granted.

18. On the part of the respondent, it was submitted that there is no evidence that there were any applications for licenses that were applied for and denied, rejected or declined. That the applicants have admitted that they have been issued with licenses by the respondent to operate their businesses within Embu County. Further that, there is no evidence that the respondent closed any outlet and referred to the letter dated 7th August, 2019 and submitted that the respondent actually extended notices of closure for alternative places of business in order to comply with the law. A law that the applicants have not challenged.

19. On the allegation that the applicants were not given an opportunity to be heard, it was submitted that the respondent had extended the closure of the offending outlets for about four months which was indicative that the applicants were given an opportunity to say what they desired but the applicants did not file any objection with the respondent.

Whether the respondent's decision to close down the applicants businesses amounted to abuse of power.

20. On this issue, the applicants seems to have relied on their submissions on the first issue for determination. On its part, the respondent submitted that the applicants are not challenging the constitutionality of the Act. That the applicants businesses were in operation against the law and upon discovering this fact, the respondent set out to regularize the same and issued the memorandum dated 10th July, 2019 which made reference to the Act that was being floated. Further that, the impugned letters were written to only four applicants being the 2nd, 3rd, 6th and 7th applicants and not to the rest of them and thus, the 1st, 4th and 5th applicants to whom no letters were written, have no cause of action against the respondent.

21. The respondent admitted that the fact that licenses were issued for the same premises does not justify the granting of the prayers sought in the application as it cannot be expected that a government will flout the law and its procedures in eternity. That, once the government discovers or realizes that a law was broken by its officers and subjects, it must take necessary steps to correct the position.

22. On the aspect of public participation, the respondent submitted that, the same is misplaced as that would have been a point of consideration if the respondent was being accused of having enacted the relevant legislation.

23. That the applicants have not alleged that when the law was passed, there was no public participation and even if that were the case, that was the work of the County Assembly and not the respondent.

24. The court has considered the application and the submissions filed by the respective parties. I propose to consider all the issues together. The applicants' application has been brought under Order 53 Rules (1) and (2) of the Civil Procedure Rules 2010 and Sections 8 and 9 of the Law Reform Act.

25. In their submissions, the applicants have relied on Articles 47(1) and 50(1) of the Constitution. It is trite law that judicial review proceedings are directed to the decision making process as opposed to the merits of the decision. The scope of judicial review has been addressed by courts on various occasions. In the case of **R Vs Judicial Service Commission (High Court Misc. Civil Application No. 1025/2003)** the court stated as follows: -

“The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question.”

26. The conservative grounds for judicial review that have remained outstanding in judicial review challenges include; abuse of discretion, irrationality, improper motive, failure to exercise discretion, abuse of rules of natural justice, fettering of discretion, excess of jurisdiction and error of law. The list is, however, not conclusive but the court must address each case on its own merits.

27. In the case of **Council of Civil Service Unions and Others Vs Minister for the Civil Service [1924] 3 All ER 935** the House of Lords held thus;

“An aggrieved person was entitled to invoke judicial review if he showed that a decision of a public authority affected him by depriving him of some benefit or advantage which in the past he had been permitted to continue to enjoy either until he was given reasons for its withdrawal and the opportunity to comment on those reasons or because he had received assurance that it would not be withdrawn before he had been given the opportunity of making representations against the withdrawal”.

28. The applicants herein have complained that their licenses were withdrawn without any justification and the refusal to renew their liquor licenses was done arbitrarily without affording them a fair hearing. The court has perused the notice of closure of the liquor businesses dated the 7th August, 2019 and others dated the 15th August, 2019 but the contents are the same. They both refer to a memo Ref. No. CO. T&T/ALCOlt.8/1 Vol.IV/16 dated 10th July, 2019 which unfortunately, none of the parties annexed to their affidavits for perusal by this Honourable Court. The court does not therefore know the contents of the said memo. The notices of closure extended the period of closure until the 7th November, 2019 to enable the applicants look for alternative outlets.

29. In the meantime, they were allowed to operate their businesses subject to payment of the County Business permit, payment of Health License and payment of liquor license. It was also on condition that there was strict compliance with opening hours as stipulated in the law and adherence to the existing regulations as a General Retail Alcoholic Drinks Off-License.

30. The applicants aver that they had been licensed to operate the aforesaid businesses. The documents that they have attached reveals that only the 1st, 2nd, 4th and 6th applicants had been granted permits by the respondent.

31. The 3rd, 5th and 7th applicants had not been granted permits. On the other hand, out of those who annexed their permits, only the 2nd applicant had a valid license at the time of filing the application. The license for 4th applicant expired way back in the year 2017 and there was no evidence that she had applied for renewal of the same and that the respondent had declined to renew the same. The memo that sought to close their businesses is dated 10th July, 2019 by which date none of the applicants had both a valid permit and license, apart from the 2nd applicant and she is the only applicant who can be said to have had locus to sue.

32. However, and that notwithstanding, the notice for closure of the businesses clearly states that the applicants be given a period of three months to look for alternative outlets.

33. The applicants cannot, therefore, be heard to say that they were not given reasonable time. As rightly submitted by the respondent, the applicants waited until the expiry of the notice to move to court. The notice cannot be said to be unreasonable as alleged. They ought to have moved the court immediately the notices were issued and/or raise the issue with the respondent.

34. The applicants also took issue with the respondent for its failure to renew their licenses. In the replying affidavit, the respondent states that the permits granted to the applicants were given with specific conditions and were to be used within the confines of the provisions of the law to wit Embu Alcoholic Drinks Control Act 2014. One such requirement was for the applicants not to sell or operate alcohol selling business within the bus park.

35. The court has perused the provisions of Section 38 of Embu County Alcoholic Drinks Control act, No. 3 of 2014 which provides as follows;

Section 38(1)

(1) Any person who sells an alcoholic drink or offers or exposes it for sale or who bottles an alcoholic drink except under and in accordance with, and on such premises as may be specified in a licence issued in that behalf under this Act commits an offence and is liable—

a) For a first offence, to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding nine months, or to both.

b) For a second or subsequent offence, to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding one year or to both, and in addition to any penalty imposed under paragraph (a) and (b), the court may order, the forfeiture of all alcoholic drinks found in the possession, custody or control of the person convicted, together with the vessels containing the alcoholic drink.

Section 38(2)

(2) Except as may be provided for in this Act, no person shall-

(a) sell, an alcoholic drink in any workplace, office, factory, public park or any public recreational facility, public transport vehicle, public beach, sports stadium or public street;

Section 38(4)

Any person who contravenes the provisions of subsection (2) and (3) commits an offence and shall be liable to the penalties under subsection (1).

36. From the above provision; it is clear that the applicants were operating their businesses illegally and against the provisions of the law. I concur with the respondent's submissions that the fact that previous licences had been issued for the same premises does not justify the prayers sought in the application.

37. As rightly submitted by the respondent, the applicants have not faulted the Act or any of the provisions contained therein as being unconstitutional. As such, I find that the application has no merits and the same is hereby dismissed.

38. Due to the circumstances of the case, each party shall bear its own costs of the application.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF SEPTEMBER, 2021.

L. NJUGUNA

JUDGE

.....for the Applicants

.....for the Respondent